

Who's Afraid of Protecting Older Persons?—Addressing the False Illusion of Having to Keep “Elder” Out of Elder Abuse Laws

James H. Pietsch*

INTRODUCTION

It would be hard to find a politician, a government employee (especially an employee of a protective services agency), or just about anyone else who opposes protecting the elderly. Why then, is there such a reluctance to support “elder abuse” laws specifically intended to protect older persons? This article explores whether attacks on the use of any age criterion in “elder abuse” statutes are legitimate or, as with the Big Bad Wolf, just “huffing and puffing,” and whether it is time to set aside the false illusion that older persons do not deserve special protection.¹ Unfortunately, the attackers themselves often portray the threat of government intrusion as the Biggest Bad Wolf. While literature sometimes helps to provide insight into the human condition,² legal fiction seems to prevail in telling the continuing story of elder abuse laws in many parts of the United States,

* Professor of Law, William S. Richardson School of Law and Adjunct Professor of Geriatric Medicine and Psychiatry, John A. Burns School of Medicine, University of Hawaii at Manoa; Director, University of Hawaii Elder Law Program, (UHELP). Since 1991 UHELP has provided legal services and information to socially and economically needy older persons and to caregivers primarily under grants through the City and County of Honolulu Elderly Affairs Division under Title III of the Older Americans Act, through the Hawaii Judiciary Indigent Legal Assistance Fund and the Hawaii Justice Foundation. UHELP receives several hundred calls each year related to abuse, neglect, exploitation and abandonment of older persons in Hawaii. A significant percentage of calls are about individuals who are turned away by Adult Protective Services (APS) because they do not fit within the criteria and definitions of current Hawaii protective services law. The current law and a new law effective July 1, 2009 do not include any definition of advanced age as a criterion. One call in particular during the summer of 2008 involved a female victim 103 years of age who did not meet the APS criteria for protection since she was not a “dependent adult.” © 2009, James H. Pietsch.

1. See, e.g., JOSEPH JACOBS, *ENGLISH FAIRY TALES AND MORE ENGLISH FAIRY TALES* (Donald Haase ed., ABC-CLIO, Inc. 2002) (1890). (“Huffing and puffing” refers to actions taken by the “Big Bad Wolf,” a villainous character appearing in Joseph Jacob’s English fairy tale about three little pigs who are terrorized by a wolf who threatens to blow their houses down). See also EDWARD ALBEE, *WHO’S AFRAID OF VIRGINIA WOOLF?* (Dramatists Play Service, Inc. 1962); William Flanagan, *The Art of Theater No. 4: Edward Albee*, in *THE PARIS REVIEW* 12 (Fall 1966); Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 *CONN. L. REV.* 77 (Fall 1998). In *Who’s Afraid of Virginia Woolf?*, Edward Albee’s characters engage in vociferous fights revolving around the question of who’s afraid of living life without false illusions. Moskowitz provides allusions to elder abuse issues.

2. See e.g., H.P. Blum, *A Psychoanalytic View of Who’s Afraid of Virginia Woolf*, 17 *J. AM. PSYCHOANALYTICAL ASS’N* 888-903 (1969).

including Hawaii.

Adult protective laws are primarily the responsibility of the States, but the Federal government is attempting to play a greater role in supporting “elder justice” initiatives. This article will first provide a brief overview of this Federal-State dynamic in addressing elder abuse. It will then highlight Hawaii’s experience in drafting, enacting and amending adult protective services laws as an example of how tensions in society impact elder abuse legislation. Such insights may lead to resolving how communities may better balance the competing concepts of best interests, autonomy/self determination, duty, honor and even saving money when it comes to protecting older persons. Finally, this article will review some of the efforts made by advocates in Hawaii to enhance protections for the elderly in view of the seemingly failed legislative approach to what has been called, for many years, a “hidden epidemic” of elder abuse in the State.³ This will include an overview of the provisions of a recently enacted law, effective in July 2009, which seeks to address some of the problems experienced by abused elderly people in Hawaii.

FEDERAL AND STATE LAWS AND INITIATIVES TO ADDRESS ELDER ABUSE

According to the American Bar Association Commission on Law and Aging⁴ for the National Center on Elder Abuse (“NCEA”),⁵ there is no comprehensive Federal law on elder abuse and, although each of the States and most of the U.S. Territories have adult protective services legislation to address instances of elder abuse, these statutes vary widely.⁶

One major Federal initiative to bring Federal attention to the issue of elder abuse is the proposed Elder Justice Act legislation.⁷ The NCEA⁸ is one of the major organizations in the Elder Justice Coalition⁹ partnering to help pass this law. While acknowledging that “[d]ifferences in State laws and practices in the areas of elder abuse, neglect, and exploitation lead to significant disparities in prevention, protective and social services, treatment systems, and law enforce-

3. See, e.g., Sandra Oshiro, *Elder Abuse ‘Epidemic’ In Hawaii*, HONOLULU ADVERTISER, June 19, 1997, at A1.

4. See American Bar Association Commission on Law and Aging, <http://www.abanet.org/aging> (last visited Aug. 7, 2008).

5. See National Center on Elder Abuse Administration on Aging, <http://www.ncea.aoa.gov> (last visited Aug. 7, 2008).

6. See Lori Stiegel & Ellen Klem, *Information About Laws Related to Elder Abuse*, http://www.abanet.org/aging/about/pdfs/explanation_for_APS-IA-LTCOP_citations_chart.pdf (last visited Aug. 7, 2008). Each of the fifty states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands have authorized adult protective services statutes. These statutes vary widely based on who may be eligible for services and the types of abuse that may be actionable. At the same time, federal laws such as the Older Americans Act, 42 U.S.C. § 3002 *et seq.* (2009), do little more than authorize funds for local awareness and coordination endeavors. Unlike Federal laws on child abuse and domestic violence which fund services and shelters for victims, there is no comparable federal law on elder abuse.

7. Elder Justice Act, S. 333, 108th Cong., <http://thomas.loc.gov/cgi-bin/query/z?c108:S.333>: (last visited Aug. 7, 2008). In Section 3, the purposes of the Act are listed as follows:

ment, and lead to other inequities,”¹⁰ nowhere in the proposed legislation is there a provision for a Federal elder abuse law, nor is there any requirement or real encouragement for the States to specifically include old age¹¹ as a basis for

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- (1) To bring a comprehensive approach to preventing and combating elder abuse, neglect, and exploitation, a long invisible problem that afflicts the most vulnerable among the aging population of the United States.
 - (2) To raise the issue of elder abuse, neglect, and exploitation to national attention, and to create the infrastructure at the Federal, State, and local levels, to assure that individuals and organizations on the front lines, who are fighting elder abuse, neglect, and exploitation with scarce resources and fragmented systems, have the resources and information needed to carry out their fight.
 - (3) To bring a comprehensive multi-disciplinary approach to elder justice.
 - (4) To set in motion research and data collection to fill gaps in knowledge about elder abuse, neglect, and exploitation.
 - (5) To supplement the activities of service providers and programs, to enhance training, and to leverage scarce resources efficiently to ensure that elder justice receives the attention it deserves as the Nation's population ages.
 - (6) To examine the many different laws and practices relating to elder justice in different States and jurisdictions to ascertain which among those laws and practices are the most effective.
 - (7) To promote the development of an effective adult fiduciary system, including an adult guardianship system, that protects individuals with diminished capacity, maximizes their autonomy, and develops effective resources and an elder rights system.
 - (8) To recognize and address the role of mental health, disability, dementia, substance abuse, medication mismanagement, and family dysfunction problems in increasing and exacerbating elder abuse, neglect and exploitation.
 - (9) To create a short- and long-term strategic plan for the development and coordination of elder justice research, programs, studies, training, and other efforts nationwide.
 - (10) To promote collaborative efforts and diminish overlap and gaps in efforts in developing the important field of elder justice.

8. See NCEA, *supra* note 6, at 2. According to its website “The NCEA, directed by the U.S. Administration on Aging, is committed to helping national, state, and local partners in the field be fully prepared to ensure that older Americans will live with dignity, integrity, independence, and without abuse, neglect, and exploitation.”

9. See Elder Justice Coalition, <http://www.elderjusticecoalition.com> (last visited Aug. 7, 2008). According to its website, the Elder Justice Coalition, through national and grassroots advocacy, educational briefings, media outreach, research, and information dissemination seeks to:

- Increase public awareness of the tragedy of elder abuse, neglect and exploitation at the local, state, and national levels.
- Increase awareness and support for the Elder Justice Act in the Senate as a comprehensive approach to addressing elder justice issues.
- Conduct a parallel advocacy effort in the House of Representatives.
- Work for expedited consideration of the Elder Justice Act before relevant Senate and House Committees and Subcommittees.
- Monitor and appropriately influence other relevant legislation and regulations that pertain to the prevention of elder abuse, neglect and financial exploitation.

10. See NCEA, *supra* note 6, at 2 (Findings (10)).

11. See Age Discrimination in Employment Act of 1967, as amended, Pub. L. 90-202.

See also Labor Age Limitation, 29 U.S.C. § 631 (2009); Programs for Older Americans, The Public Health and Welfare, 42 U.S.C. § 3002 (35) (2009); The Social Security Act, Federal Old-Age, Survivors,

inclusion in any state adult protective service law.

As evidenced by the substantial number of articles listed by the Clearinghouse on Abuse and Neglect of the Elderly (“CANE”),¹² legal and ethical dilemmas, including the issue of ageism, abound in addressing elder abuse issues.¹³ Further, constitutional issues have been raised over using age as a criterion for elder abuse laws.¹⁴ The United States Supreme Court, although in a different context, favorably noted society’s interest in “protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes.”¹⁵ Using age classifications to protect individuals from harm has been considered constitutional under a rational basis test.¹⁶ Although definitions vary

and Disability Insurance Benefits, 42 U.S.C. §§ 401-433 (2009). What constitutes “old age” is a foundational question, but it is very difficult to answer. Is it chronological, biological, psychological, functional or social age? The federal government and the States have used different ages for different purposes. For example: Age 40 is the threshold age under the federal Age Discrimination in Employment Act. *See* 29 U.S.C. § 631.

- Age 60 is the age of eligibility for most services and programs under the Older Americans Act. (“The term ‘older individual’ means an individual who is 60 years of age or older”). *See* 42 U.S.C. § 3002 (35).
- Age 62 is the age a worker is eligible for Social Security early retirement benefits. *See* Title III of the Social Security Act, 42 U.S.C. §§ 401-433.
- Age 65 was the standard age for full Social Security retirement benefits but this is increasing for people born after 1938 and will go from 65 to 67 depending upon the year of birth, *Id.*
- State “Elder Abuse” statutes vary on age criteria for protective services. *See infra* note 18.

12. The Clearinghouse on Abuse and Neglect of the Elderly, <http://www.cane.udel.edu/> (last visited Aug. 7, 2008). Located at the University of Delaware, CANE is the nation’s largest archive of published research, training resources, government documents, and other sources on elder abuse.

13. *See, e.g.*, National Center on Elder Abuse, *Ethical Concerns in Addressing Elder Abuse - Respecting Autonomy and Self-Determination while Providing Protection*, http://ncea.aoa.gov/NCEAroot/Main_Site/Library/CANE/CANE_Series/CANE_ethicalconcerns.aspx (last visited Aug. 7, 2008); National Center on Elder Abuse, *Ageism*, http://ncea.aoa.gov/NCEAroot/Main_Site/Library/CANE/CANE_Series/CANE_ageism.aspx (last visited Aug. 7, 2008).

14. *See, e.g.*, American Civil Liberties Union (“ACLU”) testimony before the Hawaii Senate Committee on Human Services and Public Housing, (Senate Hearing, Twenty-Fourth Legislative Session) Feb. 6, 2007; ACLU testimony before the Hawaii House Committees on Human Services and Housing and Health, (House Hearing, Twenty-Fourth Legislative Session) Feb. 12, 2007; ACLU testimony before the Hawaii House Committees on Human Services and Housing and Health, Feb. 12, 2007. In testifying against proposals (H.B. No. 811 (2007) and S.B. No. 1184 (2007)) to change Hawaii’s Adult protective Services law (HAW. REV. STAT. part X, Chapter 346) to cover individuals 75 years of age or over, the ACLU argued that the change would violate the constitutional rights of elder adults and that one should not be subject to government intrusion into one’s personal affairs on the basis of advanced age alone. *Id.* Standing on their written testimony, they had no response to arguments that other laws specifically address older persons and that any protections would be afforded on a voluntary basis—that, just as under current law, a mentally capacitated adult could decline services. *See infra* notes 17, 29-47, 90. The ACLU did not testify against three other session bills which specifically provided protections for persons 62 years of age or older. *See infra* notes 45-47.

15. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

16. *See, e.g.* *Essling v. Markman*, 335 N.W. 2d 237 (Minn. 1983) (The State of Minnesota’s attempt to curb abuses by the insurance industry in selling policies to persons over 65). In this case the Minnesota Supreme Court addressed, along with a right to contract claim, a claim that the State had wrongfully

from the use of specific ages, e.g. 60 or 65, or through such terms as “advanced age” or “the infirmities of old age,” at least fifteen states use age as a criterion for providing protective services to seniors who are victims of abuse.¹⁷ Older persons have traditionally been afforded respect and even extra privileges or considerations. Examples of “positive age discrimination” abound in the ordinary life experiences which include discount bus passes, priority seating on public busses, discount movie tickets, real property tax relief, state and national park passes, discount meals, and traditions of respect in most cultures around the world. Could not easier (and voluntary) access to adult protective services be one more privilege?

ELDER ABUSE IN HAWAII AND LAWS TO PROTECT ABUSED ELDERLY

Like many other states, Hawaii has addressed the issue of elder abuse through the legislative process. It seems, however, that Hawaii is inconsistent in its philosophy relating to whether or not specific protection should be extended to older persons. This inconsistency can be seen through the evolution of the laws Hawaii has adopted relating to elder abuse.

Nearly two centuries ago, King Kamehameha the Great¹⁸ gave Hawaii its first law. Known as the Law of the Splintered Paddle, or *Mamala-hoe Kanawai*,¹⁹

interfered with their right to privacy because of their age. The Court claimed that this deprivation occurred without due process of law. Relying on *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), the Court found that, absent a fundamental right or suspect class, minimal judicial scrutiny is appropriate, that age has never been considered a suspect classification, and, accordingly, minimal judicial scrutiny is appropriate. The Court went on to find that the law should be upheld because the classification is rationally related to achievement of a legitimate governmental purpose.

17. CONN. GEN. STAT. § 17b-450 (2009); GA. CODE ANN. § 30-5-3 (2009); 320 ILL. COMP. STAT. 20/2(e) (2009); LA. REV. STAT. ANN. 14:93.3(C) (2008); MO. ANN. STAT. § 660.053 (2009); N.C. GEN. STAT. § 108A-101(d) (2009); N.D. CENT. CODE § 12.1-31-07 (c) (2009); OHIO REV. CODE ANN. § 5101.60(B) (West 2009); OR. REV. STAT. § 124.005(2) (2009); S.C. CODE ANN. § 43-35-10(11) (2008); S.D. CODIFIED LAWS § 22-46-1(2) (2009); TENN. CODE ANN. § 71-6-102(2) (2009); TEX. HUM. RES. CODE ANN. § 48.002(1) (2009); WIS. STAT. ANN. § 940.285(b), (e) (West 2009); WYO. STAT. ANN. § 35-20-102(a)(vi) (2009). *See also infra* note 112.

18. King Kamehameha I (Born: between 1740 and 1758; Died: May 8, 1819) united all of the islands except Kauai during his reign.

19. The first edict declared by Kamehameha was the Law of the Splintered Paddle—based on his own experience on a fateful day which taught him that human life was precious and deserved respect . . .”

The Law of the Splintered Paddle

“O my people,
Honor thy god;
Respect alike (the rights of) men great and humble;
See to it that our aged, our women, and our children
Lie down to sleep by the roadside
Without fear of harm.
Disobey and die.”

The Law of The Splintered Paddle, Hawaii Legal Auxiliary (1998).

Hawaii's first law establishes a history and tradition of protecting older persons. The initial edict of the King required that the aged, women, and children should be protected from harm while they slept by the roadside, under the most severe of penalties, death.²⁰ The Law of the Splintered Paddle continues to be a part of the current State Constitution,²¹ but now serves only as a "symbol of the State's concern for public safety."²²

The cultural conditions that existed in the time of King Kamehameha the Great have changed and elder abuse in Hawaii takes the same form as in other states. The NCEA has defined the major types of elder abuse as physical abuse, sexual abuse, emotional or psychological abuse, neglect, abandonment, financial or material exploitation, and self-neglect.²³ In order to address these forms of abuse,

20. *Id.* Traditionally older persons in Hawaii have been shown respect and deference and were valued for the lessons they imparted to following generations. Some lament the changes in modern society. *See, e.g.,* Claire Ku'uleilani Hughes, *Traditional Behaviors and Kupuna*, in KA WAI OLA, THE LIVING WATER OF OHA 9 (Office of Hawaiian Affairs, 2008).

Early Hawaiians were often characterized as gentle, gracious, generous and polite. And that is because chiefs and commoners alike were taught the traditional values of humility, kindness and generosity. *Kupuna* taught children of all social strata the courtesies and behaviors required with their elders, particularly, with their chiefs. Good breeding was demonstrated by acting and speaking with courtesy and walking and sitting with dignity. By the mid-1800s, Hawaiian historian Kepelino lamented, "But, today these good teachings are being lost and the arrogant ways of the Americans are common here."

... Interestingly, Kepelino saw the traditionally taught courtesies and behaviors were being lost and replaced, 150 years ago. Admittedly, today courtesy is no longer a demonstrated norm. And sadly, speaking with respect for elders has also waned.

... Traditionally, *Kupuna* held an enviable position in the Hawaiian family. *Kūpuna* were considered wise and accomplished. *Kupuna* were the constant, steady and positive influence for both *makua* (ancestors) and *mo'opuna* (grandchildren). *Kūpuna* observed and continued to gently guide their own children as they settled into the role of family providers. *Kupuna* also focused on teaching *mo'opuna* the family history, values, behaviors and courtesies taught to them by their *Kupuna*. The 21st century has brought more challenges and changes to the Hawaiian family system and many are not desirable.

21. HAW. CONST. art. IX, § 10 (1978).

22. *Id.* ("The law of the splintered paddle, *mamala-hoe kanawai*, decreed by Kamehameha I – Let every elderly person, woman and child lie by the roadside in safety—shall be a unique and living symbol of the State's concern for public safety." (HAW. CONST. art. IX, § 10 (1978)).

23. *See* National Center on Elder Abuse, *Major Types of Abuse*, http://ncea.aoa.gov/NCEAroot/Main_Site/FAQ/Basics/Types_Of_Abuse.aspx (last visited Aug. 7, 2008). The NCEA defines these major types of abuse as follows:

Physical abuse is defined as the use of physical force that may result in bodily injury, physical pain, or impairment. Physical abuse may include but is not limited to such acts of violence as striking (with or without an object), hitting, beating, pushing, shoving, shaking, slapping, kicking, pinching, and burning. In addition, inappropriate use of drugs and physical restraints, force-feeding, and physical punishment of any kind also are examples of physical abuse.

Sexual abuse is defined as non-consensual sexual contact of any kind with an elderly person. Sexual contact with any person incapable of giving consent is also considered sexual abuse. It includes, but is not limited to, unwanted touching, all types of sexual assault or battery, such as rape, sodomy, coerced nudity, and sexually explicit photographing.

Emotional or psychological abuse is defined as the infliction of anguish, pain, or distress

Hawaii has adopted a number of laws.

In 1989, the Hawaii State Legislature enacted the Dependent Adult Protective Services Act ("DAPSA").²⁴ The originally proposed legislation included specific reference to older persons,²⁵ but that provision was deleted by the legislature in the final version which ultimately became law.²⁶ Despite the protests of those who question the constitutionality of laws to afford greater protections to older

through verbal or nonverbal acts. Emotional/psychological abuse includes but is not limited to verbal assaults, insults, threats, intimidation, humiliation, and harassment. In addition, treating an older person like an infant; isolating an elderly person from his/her family, friends, or regular activities; giving an older person the 'silent treatment;' and enforced social isolation are examples of emotional/psychological abuse.

Neglect is defined as the refusal or failure to fulfill any part of a person's obligations or duties to an elder. Neglect may also include failure of a person who has fiduciary responsibilities to provide care for an elder (e.g., pay for necessary home care services) or the failure on the part of an in-home service provider to provide necessary care. Neglect typically means the refusal or failure to provide an elderly person with such life necessities as food, water, clothing, shelter, personal hygiene, medicine, comfort, personal safety, and other essentials included in an implied or agreed-upon responsibility to an elder.

Abandonment is defined as the desertion of an elderly person by an individual who has assumed responsibility for providing care for an elder, or by a person with physical custody of an elder.

Financial or material exploitation is defined as the illegal or improper use of an elder's funds, property, or assets. Examples include, but are not limited to, cashing an elderly person's checks without authorization or permission; forging an older person's signature; misusing or stealing an older person's money or possessions; coercing or deceiving an older person into signing any document (e.g., contracts or will); and the improper use of conservatorship, guardianship, or power of attorney.

Self-neglect is characterized as the behavior of an elderly person that threatens his/her own health or safety. Self-neglect generally manifests itself in an older person as a refusal or failure to provide himself/herself with adequate food, water, clothing, shelter, personal hygiene, medication (when indicated), and safety precautions.

The definition of self-neglect excludes a situation in which a mentally competent older person, who understands the consequences of his/her decisions, makes a conscious and voluntary decision to engage in acts that threaten his/her health or safety as a matter of personal choice.

24. See Act 189 Haw. Sess. Laws 1989 (codified at HAW. REV. STAT. Part X, Chap. 346 (1989)).

25. DEPENDENT ADULT PROTECTIVE SERVICES, 346 HAW. REV. STAT. § 221 (1989). The original proposal was entitled, Elder and Dependent Adult Protective Services Act which would have included under its scope both older persons (60 years of age or above—original draft 1988 draft proposal on file with author) and "dependent adults" between the ages of 18 and 59. See also *infra* note 75. Although the statute provides protections to all persons who are 18 years of age or over, HAW. REV. STAT. § 346-221 emphasizes "[t]he legislature recognizes that citizens of the State who are elders and mentally or physically impaired constitute a significant and identifiable segment of the population and are particularly subject to risks of abuse, neglect and exploitation."

26. Other measures were also changed from the original draft, e.g. the provision that the protections of the law would be available if a victim has been abused or was at risk of imminent abuse was changed to a stricter requirement that the victim must have been abused and was threatened with imminent abuse before intervention by the State would be permitted. Vestiges of the original draft can still be seen in the existing law. For example, coroners are still mandated reporters under HAW. REV. STAT. § 346-224 (1993) even though it is unlikely that in their official duties they would be in a position to that a victim would be threatened with imminent abuse. Also HAW. REV. STAT. § 346-224 provides that "[a]n individual shall not be involuntarily subjected to the provisions of this part solely based on advanced age." Further HAW. REV. STAT. § 346-224 (d) has a more inclusive reporting standard for discretionary reporters (actual abuse or

persons, the DAPSA does recognize the State's interest in protecting elders.²⁷ This statute is discussed below in more detail as an example of a legal tool utilized to address elder abuse in Hawaii.

ELDER LAWS

While DAPSA does not provide specific protections for older persons, as outlined below, the Hawaii State Legislature has passed several laws which provide additional protections specifically for older persons. These protections exist in a variety of different areas of the law.

Most acts of elder abuse are offenses described in the Hawaii Penal Code²⁸ (HPC), which provides criminal penalties for crimes against all persons in Hawaii. Much of the abuse directed against the elderly can be prosecuted under the HPC. The HPC enumerates a number of enhanced penalties for certain crimes directed against older or disabled individuals.²⁹ These penal provisions provide the backbone for the City and County of Honolulu to establish an Elder Abuse/Justice Unit within the Office of the Prosecuting Attorney.³⁰ The Department of Commerce and Consumer Affairs has the responsibility of investigating reports of consumer fraud and imposing penalties, including enhanced penalties for fraud directed against elders.³¹

Hawaii's so-called Elder Justice Act, which took effect in 2003, authorizes the Attorney General, on behalf of the State, to pursue a civil action against certain

threatened imminent abuse), while HAW. REV. STAT. § 346-227 uses reporting criteria for mandated reporters that abuse has occurred and is imminent.

27. See HAW. REV. STAT. § 346-221 (1993).

28. See DISPOSITION OF CONVICTED DEFENDANTS, CHAPTER 706, HAW. REV. STAT. (1986).

29. HAW. REV. STAT. § 706-620 (2003) prohibits sentencing a defendant to a term of probation if the crime involved the death of or infliction of serious or substantial bodily injury upon a child, an elder person, or a handicapped person. HAW. REV. STAT. § 706-660.2 (2003) provides for mandatory minimum terms of imprisonment for persons who, in the course of committing or attempting to commit a felony, causes death or inflicts serious or substantial bodily injury upon a person who is sixty years of age or older, or blind, paraplegic or quadriplegic or eight years of age or younger. HAW. REV. STAT. § 706-662 (2003) provides criteria for extended terms of imprisonment for a defendant who is an offender against the elder, handicapped, or minor under the age of eight.

30. In its inaugural pamphlet, the Office of the Prosecuting Attorney stated that it "is committed to fighting elder abuse and improving the quality of life for all seniors in the State of Hawaii. To accomplish this goal, the Elder Abuse/Justice Unit was created." Message from Prosecuting Attorney Peter B. Carlisle in "Abuse is getting old" pamphlet (2008). "To enhance awareness, prevention, and prosecution of crimes affecting the elderly."

31. HAW. REV. STAT. § 480-13.5 (1998) provides:

caregivers who have been found guilty of abusing³² a dependent elder.³³ The action can be for the purposes of prevention, restraint, or remedy.³⁴ The statute defines neglect as “the reckless disregard for the health, safety or welfare of a dependent elder . . . that results in injury[.]”³⁵ To illustrate the range of actions that constitute neglect, the statute reads: “ ‘Neglect’ includes, but is not limited to . . . [f]ailure to provide or arrange for necessary . . . health care; except when such failure is in accordance with the dependent elder’s [health care] directive”³⁶ If a dependent elder lacks sufficient capacity to communicate a responsible decision, abuse occurs when the individual is “exposed to a situation or condition which poses an imminent risk of death or risk of serious physical harm”³⁷

In the event that abuse or negligence is found, a mandatory civil penalty will be ordered in an amount “not less than \$500 nor more than \$1,000 for each day that the abuse occurred . . . [plus] costs of investigation.”³⁸ The statute does not specify a maximum penalty.³⁹ The law provides limited protection; to qualify, an offense must be committed against a resident who is sixty-two years of age or older, has a mental or physical impairment, and is dependent upon another for personal health, safety, or welfare due to the impairment.⁴⁰ Those who can be held liable as caregivers include “any person who has undertaken the care, custody, or physical control of, or who has a legal or contractual duty to care for

(a) Additional civil penalties for consumer frauds committed against elders.

If a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$10,000 for each violation.

(b) In determining the amount, if any, of civil penalty under subsection (a), the court shall consider the following:

- (1) Whether the person’s conduct was in willful disregard of the rights of the elder;
- (2) Whether the person knew or should have known that the person’s conduct was directed toward or targeted an elder;
- (3) Whether the elder was more vulnerable to the person’s conduct than other consumers because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability;
- (4) The extent of injury, loss, or damages suffered by the elder; and
- (5) Any other factors the court deems appropriate.

(c) As used in this chapter, “elder” means a consumer who is sixty-two years of age or older.

32. HAW. REV. STAT. § 28-94(a) (2003). The statute defines abuse as “actual or imminent physical injury, psychological abuse or neglect, sexual abuse, financial exploitation, negligent treatment, or maltreatment.” *Id.*

33. HAW. REV. STAT. § 28-94(a) (2003).

34. *Id.*

35. *Id.*

36. HAW. REV. STAT. § 28-94(b) (2003).

37. HAW. REV. STAT. § 28-94(b)(5) (2003).

38. HAW. REV. STAT. § 28-94(a) (2003).

39. *Id.*

40. HAW. REV. STAT. § 28-94(b) (2003).

the health, safety, and welfare of a dependent elder, including . . . owners, operators, employees, or staff of . . . [l]ong-term care facilities . . . ”⁴¹

There is a significant limitation imposed under the law, or, more accurately, perhaps carved out of the original proposed legislation. As originally drafted, the proposed legislation would have covered individual caregivers in addition to institutional caregivers. The Legislature was later persuaded that enactment of such a law covering individual caregivers would serve to limit the number of individuals who would be attracted to serve as caregivers.⁴² However, a significant advantage to claims brought by the attorney general is the statutory exclusion of actions brought by the State through a statute of limitation.⁴³

Hawaii’s enactment of laws that are specifically aimed at protecting residents on the basis of age has not been consistent. During the 2007 legislative session, the Hawaii State Legislature enacted a number of age-specific laws, while declining to adopt age-specific language into an Adult Protective Services measure.

Under Act 94—Relating to Financial Abuse—financial institutions in Hawaii are required to report any suspected financial abuse committed against a senior citizen aged 62 or older to the Department of Human Services (“DHS”) or a local law enforcement agency. The new law imposes a mandatory duty on any financial institution to report any such suspected incident of financial abuse immediately by telephone to DHS, followed by a written report within five business days.⁴⁴ Under Act 95—Relating to Enhanced Penalties for Securities Violations Against Elders—the Commissioner of Securities is permitted to impose an extra \$50,000 fine per violation to any existing civil or administrative fine levied for securities violations against a person 62 years or older.⁴⁵ Under Act 50—Relating to Sanctions for Violations by Mortgage Brokers and Solicitors Committed Against Elders—the State may impose fines of up to \$10,000 for each violation by mortgage brokers and solicitors committed against elders, defined as consumers 62 years or older.⁴⁶

It was during this same session that proposed age-based protections were gutted from proposed amendments to the existing Dependent Adult Protective Services law.

NON-AGE-BASED PROTECTIVE LAWS

In addition to the previously mentioned laws providing protections to older

41. *Id.*

42. Comment of Senator Suzanne Chun Oakland during Kupuna Caucus Meeting, June 18, 2006, notes on file with author. *Kupuna* is the Hawaiian term for older person. See also *infra* note 106.

43. HAW. REV. STAT. § 657-1.5 (1993).

44. HAW. REV. STAT. § 412: 3-114 (1998).

45. HAW. REV. STAT. § 486-27 (1998).

46. HAW. REV. STAT. § 454-4.5 (1998).

persons in a few specified areas, there are several non-age-based laws that advocates have used in an attempt to protect abused older persons or to punish or sanction abusers.

The State of Hawaii Office of the Long-Term Care Ombudsman has the power to investigate incidents of alleged abuse in long term care facilities such as nursing homes and care homes. Most individuals in long-term-care facilities are older persons by almost any definition of "older person." Accordingly, this statute has a direct effect on many older persons in such facilities. As part of the statewide elderly services network, the program's main purpose is to facilitate assessment and prevention of elder abuse in long-term care facilities,⁴⁷ and to advocate improvement of the quality of care received.⁴⁸ In cases of institutional mistreatment, defined by the statute as "acts which may adversely affect the health, safety, welfare, and rights of residents," complaints can be made to the State Ombudsman.⁴⁹ Those entitled to assistance under the program include all elderly residents of long-term care facilities, intermediate care facilities, nursing homes, or similar adult care facilities.⁵⁰ A report of mistreatment can be filed by a victim, or by any other person on behalf of the victim,⁵¹ and can be made to an area agency on aging, by phone, in writing, or in person.⁵²

Investigators making unannounced visits to nursing homes, and certified Long-Term Care Ombudsman volunteers that meet regularly with residents, are also able to receive complaints.⁵³ In addition, volunteers are available to advise interested parties about issues such as resident rights and informal and formal remedies, and to refer a resident to appropriate services and agencies.⁵⁴

All complaints received are immediately investigated by the Long-Term Care Ombudsman.⁵⁵ With the written consent of the victim or victim's representative, the Ombudsman can access all patient records and files.⁵⁶ All reports are kept confidential.⁵⁷ Where an individual lacks sufficient capacity, a court may order

47. HAW. REV. STAT. § 349-3 (1993).

48. HAW. REV. STAT. § 349-12 (1993).

49. HAW. REV. STAT. § 349-12(b)(2) (1993).

50. HAW. REV. STAT. § 349-12(a) (1993).

51. HAW. REV. STAT. § 349-12(b)(2) (1993).

52. See EXECUTIVE OFFICE ON AGING, 2003 ANNUAL REPORT, 6-7, available at http://www2.state.hi.us/EOA/pdf/2003_Annual_Report.pdf (last visited Aug. 7, 2008).

53. See *id.*

54. See *id.*; see also *Long-Term Care Ombudsman Volunteer Representative Program*, <http://hawaii.gov/health/EOA/LTCO.html> (last visited Aug. 20, 2008). According to the Hawaii State Department to Health description, the Long-Term Care Ombudsman Volunteer program was created to enhance the LTCO program goals in assuring the rights and well being of residents. Volunteers act as representatives of the Long-Term Care Ombudsman Program by providing advocacy to residents during weekly confidential face-to-face visits. The purpose of these visits is to help promote the quality of life and care that residents are entitled to under Federal and State laws.

55. HAW. REV. STAT. § 349-12(b)(7) (1993).

56. *Id.*

57. HAW. REV. STAT. § 349-12(b)(7)-(8) (1993).

disclosure.⁵⁸ In the event abuse or neglect is found, the Ombudsman will advise the victim of possible options, but consent is required before the findings can be forwarded to appropriate agencies (including law enforcement) capable of taking corrective action.⁵⁹ Any act of retaliation by a facility or its employees is a misdemeanor.⁶⁰ Each act of retaliation is considered a separate incident and each day that an act continues constitutes a separate offense.⁶¹

The Medicaid Investigations Division of the Department of the Attorney General of the State of Hawaii has the power to investigate and prosecute alleged incidents of abuse in health care facilities that receive Medicaid funding.⁶² Under State law, the Division has the power to investigate alleged abuses occurring in any State nursing facility.⁶³ When findings of abuse, neglect, or exploitation of a dependent adult are made, the Division has the authority to criminally prosecute the nursing facility involved.⁶⁴ However, claims pursued by the Division must prove that conduct rises to the level of criminal intent. This is an extremely high standard that is rarely met in dependent elder abuse cases.⁶⁵ As mandated reporters under the Dependent Adult Protective Services Act however, even when conduct does not reach criminal levels, investigators are required to forward the report to the Department of Human Services.⁶⁶

The Department of Health and the Department of Commerce and Consumer Affairs helps assure the safety of many older persons in nursing facilities through their regulatory powers even though, much like the Long-Term Care Ombudsman,⁶⁷ the authorizing statute does not include an age component. All nursing facilities in Hawaii must be licensed by the State Department of Health (DOH).⁶⁸ If a facility fails to "substantially . . . conform to the required [licensing] standards[.]" the license may be revoked or suspended.⁶⁹ Currently, standards require all facilities to have a written policy prohibiting the mistreatment, neglect, or abuse of a resident.⁷⁰ Thus, intervention can also be initiated by filing a complaint with the Department of Commerce and Consumer Affairs.⁷¹ The Department will investigate all complaints, and take appropriate action where

58. HAW. REV. STAT. § 349-12(b)(12) (1993).

59. HAW. REV. STAT. § 349-3(7) (1993).

60. HAW. REV. STAT. § 349-14(b) (1993).

61. HAW. REV. STAT. § 349-14 (1993).

62. See HAW. REV. STAT. § 28-91 (1993). This office is called the Medicaid Fraud Control Unit in many other jurisdictions.

63. *Id.*

64. *Id.*

65. Mike Gordon, *Elder Abuse Bills Take Spotlight*, HONOLULU ADVERTISER, at B8 (Feb. 27, 2003).

66. HAW. REV. STAT. § 346-224 (1993).

67. See *supra* note 48.

68. HAW. REV. STAT. § 457B-3 (1993).

69. HAW. REV. STAT. § 457B-6(3) (1993).

70. See HAW. CODE R. § 11-94-15(c)(5) (Weil 1985).

71. HAW. REV. STAT. § 457B-6(5) (1993).

violations of standards are found.⁷² Any person found in violation of the licensing standards will be fined “not more than \$500 for a first offense,” and “not more than \$1000, or imprisonment not more than one year, or both,” for subsequent offenses.⁷³ Remedies or penalties are cumulative to those available under other state laws, unless otherwise provided.⁷⁴

DEPENDENT ADULT PROTECTIVE SERVICES ACT

The most comprehensive law currently providing protection for the elderly in Hawaii is the Dependent Adult Protective Services Act (“DAPSA”)⁷⁵ which recognizes that the elderly and the mentally or physically impaired constitute a significant and identifiable segment of the population that is particularly subject to risks of abuse, neglect, and exploitation.⁷⁶ As previously mentioned, the original bill proposal included a specific provision to protect the elderly that was deleted in the final version.⁷⁷ There would be a political price to pay for the failure to specifically protect older persons in the law, especially since the law was flawed to begin with.⁷⁸

The stated purpose of DAPSA is to protect adults who are at high risk for abuse, neglect, and financial exploitation due to their dependency on others.⁷⁹ To be entitled to protection under this law, individuals must be “dependent adults” defined as persons who are at least 18 years old, who have a mental or physical impairment, and who are “dependent upon another person, a care organization, or

72. *Id.*

73. HAW. REV. STAT. § 457B-12 (1993).

74. HAW. REV. STAT. § 457B-13 (1993).

75. HAW. REV. STAT. Chapter 346 Part X.

76. HAW. REV. STAT. § 346-221 (1993).

77. *See supra* note 26.

78. *See* Rob Perez, *Law Makes It Hard to Protect Isles' Seniors*, HONOLULU ADVERTISER, May 21, 2006, available at <http://the.honoluluadvertiser.com/article/2006/May/21/In/FP605210360.html> (last visited June 23, 2006). According to newspaper accounts during a two year period prior to the introduction of bills in 2006 to make changes to the existing Dependent Adult Protective Statute, the Hawaii Department of Human Services Adult Protective Services Unit received more than 1,800 calls about suspected abuse of seniors 60 or older. The Adult Protective Services Unit investigated fewer than half of these calls. *See id.* Hawaii has a population of approximately 1.2 million persons. In a series of stinging articles in May 2006 about elder abuse and financial exploitation of the elderly in Hawaii, which included the cited article, the Hawaii Department of Human Services was the subject of much criticism for the way it addressed the issues of elder abuse in the community. Topics from the May 21, 2006 article alone highlighted the following issues for forum discussions on financial abuse of seniors:

- State investigation stopped pair from bilking widower
- Fraud, theft convictions just ‘tip of the iceberg’
- Hawaii’s rate of investigation falls short
- Isles’ adult-protection law called nation’s most restrictive

The department appears to be under pressure from the legislature and the general public to respond to requests for reform. This may explain, in part, why the department is more willing to consider proposals submitted to the *Kupuna* Caucus, although it still seems to oppose any inclusion of an age criterion.

79. HAW. REV. STAT. § 346-221 (1993).

a care facility for personal health, safety, or welfare," due to the impairment.⁸⁰

"Abuse" is defined as "actual or imminent physical injury, psychological abuse or neglect, sexual abuse, financial exploitation, negligent treatment, or maltreatment"⁸¹ Applicable situations include where "[a]ny dependent adult is not provided in a timely manner with adequate . . . physical care, medical care, or supervision,"⁸² or where "there has been a failure to exercise that degree of care toward a dependent adult which a reasonable person with the responsibility of a caregiver would exercise, including, but not limited to, failure to . . . [p]rovide necessary health care, access to health care, or prescribed medication"⁸³ For conduct to qualify as abuse under the statute however, two requirements must be met: (1) the abuse has occurred; and (2) further abuse is imminent unless protective action is taken.⁸⁴

Intervention is initiated by a report to the Department of Human Services' Adult Intake.⁸⁵ The report may be made by a mandated reporter⁸⁶ or any other person who has reason to believe that a dependent adult has been abused and is threatened with imminent abuse.⁸⁷ If the "abuse" criteria are met, the report is sent to Adult Protective Services ("APS") for investigation.⁸⁸ However, APS must have the consent of the victim, or the representative of the victim, before an investigation or protective action can commence.⁸⁹ A person mandated to make a report that knowingly fails to do so, or willfully prevents another from reporting the abuse, will be guilty of a petty misdemeanor.⁹⁰ Further, immunity is granted to anyone making a report in good faith, who might otherwise have incurred liability.⁹¹

APS may intervene to protect a victim if APS finds probable cause that a

80. HAW. REV. STAT. § 346-222 (1993).

81. HAW. REV. STAT. § 346-222 (1993).

82. HAW. REV. STAT. § 346-222(3) (1993).

83. HAW. REV. STAT. § 346-222(5) & (5)(C).

84. HAW. REV. STAT. § 346-223 (1993); *See* HAW. REV. STAT. § 346-222 (1993). "Imminent abuse" means that there exists reasonable cause to believe that abuse will occur or recur within the next ninety days. *Id.*

85. HAW. REV. STAT. § 346-224 (1993).

86. *See* HAW. REV. STAT. § 346-224 (1993). Mandated reporters include licensed or registered professionals of healing arts, physicians, nurses, pharmacists, employees or officers of any public or private agency or institution providing medical services, law enforcement, and employees or officers of any adult residential care home or similar institution.

87. HAW. REV. STAT. § 346-224 (1993).

88. HAW. REV. STAT. § 346-227 (1993).

89. HAW. REV. STAT. § 346-230 (1993). In the author's opinion, this is may be the most critical feature of any proposal to afford protections to mentally capacitated adults, including older persons. The author has witnessed how effective Adult Protective Services (APS) personnel can be in stopping abuse, just by investigating suspected cases. The knowledge that somebody in the government is watching over victims also seemed to help avoid future abuse. The author has also witnessed victims who decline services and the respect shown by APS in honoring the wishes of the mentally capacitated adult, yet offering services in the event the individual changes his or her mind.

90. HAW. REV. STAT. § 346-224(e) (1993).

91. HAW. REV. STAT. § 346-250 (1993).

dependent adult is in danger of imminent abuse. APS may undertake informal resolution with the facility, seek an order for immediate protection, seek a temporary restraining order, or file a petition with the court seeking any protective or remedial actions authorized by law.⁹² If there is probable cause⁹³ to believe that the dependent adult lacks the capacity to make such decisions and has no designated representative, a court may issue a protective order⁹⁴ and may appoint a guardian *ad litem* to represent the victim's interests.⁹⁵ Under the statute, "abuse" is demonstrated by a preponderance of the evidence.⁹⁶ If the court determines that abuse has taken place, a protective order will be issued.⁹⁷ In addition, "[t]he court may . . . order the appropriate parties to pay or reimburse reasonable costs and fees of the guardian *ad litem* and counsel appointed for the dependent adult."⁹⁸ Protective proceedings do not preclude use of any other criminal, civil, or administrative remedies.⁹⁹

In addition to the Long-Term Care Ombudsman, the Attorney General's Medicaid Investigations Division and Adult Protective Services, the Hawaii Disability Rights Center may be able to assist certain disabled victims. Domestic violence organizations may be able to further assist victims who are abused by household members. Private legal remedies may also be pursued, including restraining orders and actions for breach of contract, tort, and civil fraud.¹⁰⁰

92. HAW. REV. STAT. § 346-228 (1993). Where injury is imminent, an order for immediate protection may be obtained orally or in writing by the department, without notice to the defendant and without a hearing. HAW. REV. STAT. § 346-231(a) (1993). If an order is issued orally, it must be reduced to writing within 24 hours, and the department must file a petition with the court within 24 hours. HAW. REV. STAT. § 346-231(e) (1993). A hearing to show cause why an order should be continued will take place within 72 hours of the issuance of a written order. HAW. REV. STAT. § 346-231(f) (1993). If cause is shown, the court is required to schedule an adjudicatory hearing "as soon as it is practical." HAW. REV. STAT. § 346-232(c) (1993).

93. HAW. REV. STAT. § 346-231(b)(1993). The statute provides that a finding of probable cause may be based in whole or in part upon hearsay evidence when direct testimony is unavailable.

94. HAW. REV. STAT. § 346-231 (1993).

95. HAW. REV. STAT. § 346-234 (1993).

96. HAW. REV. STAT. § 346-240(b) (1993).

97. HAW. REV. STAT. § 346-241 (1993). The statute provides that if the defendant fails to comply with the protective order, "[t]he court may apply contempt of court provisions and all other provisions available under the law[.]"

98. HAW. REV. STAT. § 346-234 (1993).

99. *Id.*

100. The Hawaii Disability Rights Center is also known as Hawaii's Protection and Advocacy Agency. Congress authorized and funded a nationwide network of Client Assistance Programs (CAP) in the 1984 Amendments to the Rehabilitation Act (P.L. 98-221). Hawaii Disability Rights Center was designated Hawaii's CAP on August 1, 1984 and by subsequent Executive Orders 89-2 and 94-06. Domestic Violence Action Center (<http://www.stoptheviolence.org>), formerly the Domestic Violence Clearinghouse and Legal Hotline provides assistance to victims of domestic violence and accepts large numbers of high risk divorce, temporary restraining order, post-decree and paternity cases. Established primarily to assist younger victims, it has not historically been suited to provide assistance to most elderly victims of abuse.

A DECADE OF INITIATIVES TO COMBAT ELDER ABUSE IN HAWAII

In 1999, then-Governor Benjamin Cayetano established an Elder Abuse Committee to provide him with recommendations for legislative reform to help combat elder abuse.¹⁰¹ In 2000, the committee recommended significant changes to the law, including deleting the “dependency” requirement and directly addressing “elder abuse.” Proposed changes would have provided protection to adults who have been abused, or who are threatened with abuse and who are unable to manage their own affairs, or who are in need of protection.¹⁰² Three subcommittees were established. They were charged with reviewing: (1) the dependent adult protective services statute (Part X, Chapter 346, Hawaii Revised Statutes); (2) criminal law changes (reviewing the penal code); and (3) new and innovative legal structures.¹⁰³ Major proposed revisions to the Dependent Adult Protective Services statute included:

- a) That the title of Part X, Chapter 346, Hawaii Revised Statutes be changed to read: “Adult Protective Services” (currently titled: “Dependent Adult Protective Services”);
- b) That the term “dependent” be eliminated from the statute; the focus of the statute would be changed to apply to all individuals 60 years of age and older and to adults (18 years to 59) if they meet this criterion— an adult who is aged 18 to 59 who because of a physical or mental impairment is unable to perform or obtain services necessary for the adult’s health, safety, or welfare;

101. REPORT TO THE GOVERNOR, STATE OF HAWAII 2000 3 (December 2000) (prepared by the State of Hawaii Governor’s Committee on Elder Abuse). Senate Bill 994, introduced during the 1999 legislative session, created a commission to examine the means to strengthen the laws pertaining to elder abuse. The Legislature sought to make needed policy recommendations to strengthen the law on dependent and elder abuse. This was a formidable task because the adult protective services law in Hawaii had not been the subject of review for more than a decade. The legislation sought to conduct a comprehensive review of Hawaii elder abuse statutes, review the adequacy of safeguards for dependent adults in the current law, and consider the trends adopted by other jurisdictions that have recently implemented elder abuse legislation. However, this bill was defeated by the State Legislature.

Thereafter, the Governor decided to convene a special committee to address elder abuse when SB 994 failed to pass. The Governor’s Committee on Elder Abuse (“GCEA”) was convened on October 22, 1999. In the initial meeting, the group decided on how to proceed with its work. The author was elected chair of the committee. The principal objective of the GCEA was to develop policy recommendations that would be submitted to the Governor by the fall of 2000. These recommendations were expected to be included in the Governor’s 2001 administration package during the legislative session.

In his appointment letters to the committee members, the Governor wrote:

“As you know, Hawaii’s elderly and dependent adult population is especially vulnerable to abuse, neglect, and exploitation. The safety, health, and welfare of our elderly citizens and other dependent adults is seriously threatened by physical abuse, sexual abuse, emotional abuse, financial exploitation, neglect, abandonment, and self-neglect.” Letter from Executive Chambers dated September 15, 1999, REPORT TO THE GOVERNOR, STATE OF HAWAII 2000, prepared by the State of Hawaii Governor’s Committee on Elder Abuse (December 2000).

102. *See id.*

103. *Id.* at 3.

- c) That new definitions be created for “caregiver neglect”, “maltreatment”, and “self neglect” which clarify the availability of services to persons who have been subjected to caregiver neglect, maltreatment, and self neglect; and
- d) That a new subsection be added to Section 346-249 to establish an adult protective services system coordination committee to coordinate and improve the delivery of services to protect or aid appropriate adults as defined under the new statute.¹⁰⁴

The Committee's recommendations were never implemented as part of the Governor's 2000 legislative package, although there was much sympathy for the proposal. As chair, the author was invited to address the Governor and assembled Cabinet in a decision-making session regarding which proposals would be part of the administration's legislative package. The telling questions revolved around staffing and money issues due to budgetary problems in the State. The governor asked how many extra cases APS would have to investigate if age were one of the criteria for coverage under the proposed bill. He joked that he was approaching the age under which he could be subject to an elder abuse law and might not be comfortable with any intrusion into his life. He seemed relieved that protection under the proposed bill would be on a strictly voluntary basis. After a lengthy discussion, it was clear that covering older persons 60 years of age or even 85 years of age would, although at decreasing levels, require extra staffing, which was not a viable option under the financial circumstances. Finally, the author suggested that “elder” be defined as a person 100 years of age, to at least put a place maker in the statute for future amendment when financial times got better. After a short period of laughter, the author was thanked for his efforts and was told that there were several other measures which the cabinet needed to address.

In 2006, the Hawaii Legislature appeared poised to address the question of whether or not to enact a “real” elder abuse law in the 2007 session. The proposal submitted to the *Kupuna* Caucus¹⁰⁵ contained three basic changes to the existing Dependent Adult Protective Services Act, including a provision to include “elders” defined as individuals 75 years of age or older. In a letter to Senator Les Ihara dated July 27, 2006, regarding changes to the Dependent Adult Services Law,¹⁰⁶ a Senate Majority Office staff member forwarded a draft Senate Bill for consideration of the *Kupuna* Caucus.¹⁰⁷ The description of the originally proposed bill read:

104. *Id.* at 4-5.

105. A bi-partisan and bicameral legislative caucus which examines issues facing elder residents and decides on a package of bills to be supported. As mentioned in note 43, *Kupuna* is the Hawaiian word for older person.

106. Copy on file with author.

107. Copy on file with author.

Amends dependent adult protective services law by: (1) deleting definition of “dependent adult”; (2) extending protections to persons between 18 and 74 if they meet the definition of “vulnerable adult”;¹⁰⁸ (3) adding definition of “elder” to extend protections to persons 75 years or older; (4) enabling DHS¹⁰⁹ to investigate and the court to have jurisdiction when reason exists to believe that an elder or vulnerable adult has been abused or is threatened with imminent abuse; and (5) making conforming amendments for style, consistency and clarity.

The Hawaii Department of Human Services consistently opposed expansion of the Dependent Adult Protective Services Act. In the past and until quite recently, the main objection was, frankly stated, money.¹¹⁰ At the July 26, 2006 *Kupuna* Caucus, the message was changing. Although the department did not directly oppose the insertion of an age category for a fiscal reason, it offered a different reason to object, specifically asserting that it wanted to protect older persons from unwarranted intrusions into their lives based on age.¹¹¹ The Hawaii Chapter of the ACLU became a strange ally of DHS when it testified against the proposal under constitutional grounds.¹¹² There were inconsistencies in the State’s approach to protection of the elderly.. For example, in 2008 while one part of Governor Lingle’s administration, the Department of Human Services, was vociferously decrying the inclusion of any age criteria in an adult protective service bill, another part of the administration, the Department of Commerce and Consumer Affairs, introduced three bills to protect Hawaii’s seniors from financial abuse and fraud. The Administration’s legislative package included these bills, which were ultimately signed by the Governor and took effect in

108. “Vulnerable adult” would have meant a person between the ages of eighteen and seventy-two whose ability to meet essential requirements for mental or physical health or safety, or to protect the person’s self from abuse, neglect or exploitation is substantially impaired because of a physical, mental or other disability or incapacity.”

109. Hawaii Department of Human Services.

110. Comments of Department of Human Services representative Linda Chun during GCEA deliberations, *supra* notes 100-103; The Honolulu Elderly Affairs Division Conference, *Joining Forces to Combat Financial Exploitation/Crimes Against the Elderly* (Sept. 28, 2005) (funded by the Office of Victims of Crime, Office of Justice Programs, U.S. Department of Justice).

111. Department of Human Services representative Patricia Johnson was reported in the *Perez Honolulu Advertiser* Article *supra* note 79, stating “she and her staff reviewed the statute last summer with the intention of recommending changes, but then determined none was warranted because the law was working as the Legislature intended. She said APS staff levels currently are sufficient to handle the roughly 500 to 600 investigations it does annually.” The same article noted, “[i]f people believe the APS law needs amending, the Legislature has that power, Department of Human Services officials said. ‘It’s not us,’ said Lillian Koller, department director. Koller said the department would be happy to work with the Legislature and a broad coalition of interested groups to examine possible amendments. But Johnson sounded a cautionary note. ‘I just can’t imagine there are a lot of 65-year-olds out there who would want us to change the law so we can automatically investigate them,’ she said.”

112. See *supra* note 15.

2007.¹¹³

ACT 154

In 2008, after failing to agree upon wording that would include older persons, the Hawaii State Legislature reached a compromise for amending the existing law. In order to achieve most of the goals of the original bill introduced by the *Kupuna* Caucus, any reference to an age criteria was deleted—perhaps to be discussed another day. However, like DAPSA, vestiges of the original draft Dependent and Elder Abuse bill remain and elders are still mentioned as an important segment of the population deserving protection.¹¹⁴ The new law made significant changes to the current Dependent Adult Protective Services Law and the Governor subsequently signed Act 154 into law, effective July 1, 2009.¹¹⁵

The new law deletes “dependent” from its title and is called “Adult Protective Services.”¹¹⁶ Changes include deleting the term “dependent,” adding a more inclusive term, “vulnerable,” and giving the Department of Human Services the jurisdiction to investigate cases of abuse of a vulnerable adult who has incurred abuse or is in danger of abuse if immediate action is not taken.

Under the new law, mandated reporters are required to report cases of abuse of a vulnerable adult who has incurred abuse or is in danger of abuse if immediate action is not taken and the department is required to investigate.

Further, a “vulnerable adult” means a person eighteen years of age or older who, because of mental, developmental, or physical impairment, is unable to:

- a) Communicate or make responsible decisions to manage the person’s own care or resources;

113. See *supra* notes 45-47. The author was asked to provide testimony, on behalf of the three bills (and did) but representatives of the Department of Commerce and Consumer Affairs politely declined to provide testimony for changes to the Dependent Adult Protective Services Act for fear that they may jeopardize the chances for passage of their bills. They further requested that the author not mention the age-based bills in testimony for the Dependent Adult Protective Services Act for the same reason.

114. See Act 154, S.B. No. 2150, S.D. 2, H.D. 2, C.D. 1 Hawaii State Legislature (2008) Section I. modifying HAW. REV. STAT. § 346-221:

While advanced age alone is not sufficient reason to intervene in a person’s life, the legislature finds that many elders have become subjects of abuse, neglect, and exploitation. Substantial public interest exists to ensure that this segment of the population receives protection.

But, as with the previous administration, compromise did not include any consideration for including age, whether it be a threshold of 85 or even 100 years. Of course, the latter age requirement would have allowed APS intervention for at least one older person UHELP referred to UHELP in the summer of 2008. See *supra* note 1.

115. As mentioned, Act 154 became effective on July 1, 2009, and the numerous changes are now in effect. In a conversation with the author on July 30, 2009, David Tanaka, the Supervisor of the Adult Protective Services Program, indicated that the caseload had doubled in the first month of operations under the amended law. He also indicated that while the staffing level had doubled, a number of the staff had been identified for potential layoff by the Obama administration due to the economic downturn in the state.

116. *Id.* § 5 (modifying HAW. REV. STAT. § 346-223).

- b) Carry out or arrange for essential activities of daily living; or
- c) Protect oneself from abuse.¹¹⁷

Under the new law, “abuse” means any of the following, separately or in combination:

- a) Physical abuse;
- b) Psychological abuse;
- c) Sexual abuse;
- d) Financial exploitation;
- e) Caregiver neglect; or
- f) Self-neglect.¹¹⁸

“Caregiver neglect” means the failure of a caregiver to exercise that degree of care for a vulnerable adult that a reasonable person with the responsibility of a caregiver would exercise within the scope of the caregiver’s assumed, legal, or contractual duties, including but not limited to the failure to:

- a) Assist with personal hygiene;
- b) Protect the vulnerable adult from abandonment;
- c) Provide, in a timely manner, necessary food, shelter, or clothing;
- d) Provide, in a timely manner, necessary health care, access to health care, prescribed medication, psychological care, physical care, or supervision;
- e) Protect the vulnerable adult from dangerous, harmful, or detrimental drugs;
- f) Protect the vulnerable adult from health and safety hazards; or
- g) Protect the vulnerable adult from abuse by third parties.¹¹⁹

“Self-neglect” now means:

- a) A vulnerable adult’s inability or failure, due to physical or mental impairment, or both, to perform tasks essential to caring for oneself, including but not limited to:
 - i. Obtaining essential food, clothing, shelter, and medical care;

117. *Id.* § 6 (modifying HAW. REV. STAT. § 346-224).

118. *Id.* § 4 (modifying HAW. REV. STAT. § 346-222 – Definitions).

119. *Id.*

- ii. Obtaining goods and services reasonably necessary to maintain minimum standards of physical health, mental health, emotional well-being, and general safety;
 - iii. Management of one's financial assets; and
- b) The vulnerable adult appears to lack sufficient understanding or capacity to make or communicate responsible decisions and appears to be exposed to a situation or condition that poses an immediate risk of death or serious physical harm.¹²⁰

THE FUTURE

Will Hawaii join other states in affording older persons added protection under the law as King Kamehameha the Great did many years ago? The King sent a symbolic and forceful message to help stop abuse of the elderly. The legislature could do the same by enacting an elder abuse law. The "Big Bad Wolf" of government intervention in elder abuse cases might just deter a person from committing abuse. Nevertheless, chances for major change do not seem very good in the near future. One could assume that the current administration will continue to oppose the addition of any age criteria to the adult protective services law or they may encourage surrogates to suggest that such a move would be discriminatory against older persons.

Only time will tell but, truth be known, when the two changes (expanding the definition to cover "vulnerable adults" and investigations where there has been or is a threat of abuse) are implemented in 2009, they may form the basis of a new era of protection for the most vulnerable of our community, many of whom will certainly be older persons in Hawaii. Perhaps the traditional respect for the elderly and the protections envisioned by Kamehameha the Great will be partially restored, if not in word, at least in spirit.

120. *Id.*